

Before The  
Federal Communications Commission  
Washington D.C. 20554

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In the Matter of )

OCT 13 1998

Carriage of the Transmissions )  
of Digital Television Broadcast )  
Stations )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CS Docket No. 98-120

Amendments to Part 76 of )  
the Commission's Rules )

To: The Commission

**COMMENTS**

On behalf of various cable TV system clients, the law firm of John D. Pellegrin, Chartered hereby submits its Comments with respect to the above-referenced proceeding.<sup>1</sup> Specifically, these Comments are directed to that portion of the Notice of Proposed Rule Making which addresses carriage and retransmission consent issues as to digital TV broadcast stations. The Commission is urged to determine that the must-carry rules do not apply to digital commercial television stations during the transition period from analog television service to digital television service. Further, regardless of which requirement, if any, the Commission adopts concerning must-carry of digital television signals, the Commission should exempt small cable systems from any must-carry requirements of digital television signals until the transition period is over.

**I. Introduction**

<sup>1</sup> The Notice of Proposed Rule Making, FCC 98-153, Released July 10, 1998, established September 17, 1998, as the original Comment Date. The Commission extended the Comment Date to October 13, 1998, on August 27, 1998. See Order, DA No. 98-1719.

The Commission recognizes that the issue of must-carry during the transition period from analog to digital television service is a "difficult" one. NPRM at ¶ 39. The core problem is predicated on the fact

To the extent that the Commission imposes a digital must-carry requirement, cable operators could be required to carry double the amount of television stations that will eventually carry identical content, while having to drop various cable programming services where channel capacity is limited. NPRM at ¶ 39.

The Commission seeks comment on seven specific proposals or options offering a solutions to the must-carry problem.<sup>2</sup> The final option, i.e., the No-Must-Carry Proposal, is the only option which is reasonable for both legal and practical considerations. Section 614(b)(4)(B) of the Telecommunications Act of 1934, as amended, states that

At such time as the Commission prescribes modifications to the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

From a legal perspective, the comments previously submitted in this proceeding by the National Cable Television Association ("NCTA") are persuasive. NCTA argues that the phrase "have been changed" in Sect. 614 of the Act means that a television station's analog signal has ceased broadcasting and the station's digital signal has

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<sup>2</sup> These options are: the Immediate Carriage proposal, the System Upgrade proposal, the Phase-In proposal, the Either-Or Proposal, the Equipment Penetration proposal, the Deferral proposal, and the No-Must-Carry proposal.

replaced it as the over the air service. Under this reading, digital broadcasters would not have must-carry rights until the transition period is over. We believe this is the only proper reading of the specific language in the statute, the statute which underpins the FCC's very inquiry and search to enact compatible rules to carry out the statute's mandate.

In addition, while the Supreme Court recently ruled that the must-carry rules do not violate the First Amendment rights of cable operators, such ruling was cast in light of carriage of a single set of local, analog broadcast signals, not a duplicative set of analog and digital signals. Consequently, the constitutional validity of a requirements that a cable operator carry both analog and digital signals from one broadcast licensee is highly suspect at best -- and, more logically -- is inapplicable in this situation.

Practically, as the Commission itself recognizes, cable operators will have to drop various cable programming services where channel capacity on cable systems is limited. The Commission has already limited the variety of programming available to the American public by failing to consider LPTV stations in the allocation of digital channels, thus requiring many low power television stations to cease broadcasting as the conversion to digital television proceeds. The Commission cannot in good conscience further restrict the programming choices available to the American public by requiring carriage of digital signals with duplicative programming which forces singular, quality and

alternative choice cable programming to be forced off cable systems. Additionally, it is widely reported that broadcasters themselves and equipment manufacturers cannot agree as to standards for transmission, and many broadcasters have not chosen to use the FCC-granted additional bandwidth for digital transmissions. Thus, until the transition period is over, no must-carry requirements should be imposed in this fluid state of technical and operating characteristics.

## **II. Must-Carry Requirements for Small Cable Systems**

Digital broadcast television carriage requirements, during the transition and afterward, will indeed impose unique burdens on small cable systems and small cable operators which warrant special consideration in the development of any new digital broadcast signal carriage rules. Consequently, the Commission should develop rules which avoid being overly burdensome to small cable operators (and their relatively few subscribers) to the greatest extent possible, if must-carry of any digital signals is ultimately required.

## **III. Definition of Small Cable System**

The Commission should adopt the broadest definition of a "small cable system" in the context of digital must-carry. The Commission cites alternative definitions to choose from: those found in the must-carry provisions of the Act and those found in its rate regulation rules.

The Commission should adopt a definition of a "small cable system" which is based on the number of subscribers to a system,

not the number of channels available. With the exception of the statutory language in 47 U.S.C. §534(b)(1)(A) and 47 U.S.C. §535(b)(2)(A), all of the Commission's definitions of "small cable systems" are subscriber or revenue-based.<sup>3</sup> The Commission should then adopt the principles used in the rate regulation context to define small systems in the digital must-carry context.<sup>4</sup>

This makes sense for several reasons. The freedom from rate regulation for small cable systems provides cable operators with the flexibility to adapt to changes in the multichannel video marketplace. Without such flexibility in the digital must-carry context, small cable systems will be doomed to failure, incurring costs to carry digital signals which will in turn force up cable rates precipitously.

Furthermore, as a practical matter, the carriage by small cable systems of all local analog broadcast signals should satisfy customer demand until the transition period is over and standards of digital transmission have been established and are in place. This should then be the requirement for all small cable systems during the digital transition period.

#### **IV. Retransmission Consent**

With regard to retransmission consent and its effect on small cable operators, the Commission should prohibit tying arrangements

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<sup>3</sup> See NPRM, footnote 19.

<sup>4</sup> For example, the definition of a "small" system adopted by the Commission with SBA approval would be more than acceptable to most truly small systems; i.e., a system with 15,000 or fewer subscribers.

where an operator must-carry the broadcaster's digital signal as a precondition for carriage of the analog signal. Otherwise such tying arrangements would fly in the face of all principles affording relief to small cable systems in the digital must-carry context.

WHEREFORE, it is respectfully requested that the Commission incorporate these comments and principles into the regulations being formulated with respect to digital must-carry of television broadcasting by cable TV systems.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Robert E. Kelly", is written over the typed name.

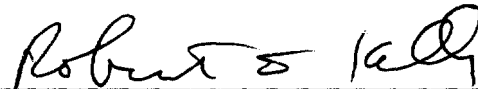
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Dated: October 13, 1998

**CERTIFICATE OF SERVICE**

I, Robert E. Kelly, an attorney in the law office of John D. Pellegrin, Chtd., do hereby certify that I have caused to be sent by the U.S. Postal Service on this 13th day of October, 1998, a copy of the foregoing "Comments" to:

\*Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M St., NW - Room 222  
Washington DC 20554

A handwritten signature in cursive script, appearing to read "Robert E. Kelly", is written over a horizontal line.

Robert E. Kelly

\*By Hand Delivery